

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JON DEE MICAH PENNINGTON,

Petitioner,

v.

Civ. 12-536 RB/GBW

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND
RECOMMENDED DISPOSITION AND DISMISSING CASE**

This matter comes before the Court on Petitioner's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody filed on May 17, 2012, *doc. 2*. On September 24, 2012, this Court dismissed all of Petitioner's claims save one— his allegation that his trial counsel was ineffective for failing to file an appeal. *Doc. 12*. The Magistrate Judge held an evidentiary hearing on that claim on May 3, 2013, at which both Petitioner and his trial counsel, Jane Greek, testified. *See doc. 46*. Petitioner claimed that immediately after his sentencing hearing, he instructed Ms. Greek to file an appeal. *Doc. 54* at 6. Ms. Greek said that Petitioner never asked her to file an appeal. *Id.*

On June 21, 2013, the Magistrate Judge issued his Proposed Findings and Recommended Disposition (PFRD). *Doc. 54*. In it, he discussed the credibility of both Petitioner and Ms. Greek, ultimately crediting Ms. Greek's version of events. *Id.* at 6-9. He then proceeded to analyze Petitioner's ineffective assistance claim in light of those facts. He determined that because Petitioner did not affirmatively tell Ms. Greek whether to file an appeal, his claim was governed by *Roe v. Flores-Ortega*, which requires that counsel consult with a defendant regarding an appeal only if a "rational defendant would want to appeal" or if "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." 528 U.S. 470, 478-80 (2000); *Doc. 54* at 12. The Magistrate Judge found that no rational defendant in Petitioner's position would have wanted to appeal because any appeal would have been frivolous. *Doc. 54* at 12-13. Based on Ms. Greek's testimony, he determined that Petitioner did not demonstrate an interest in appealing his sentence. *Id.* at 13.

Petitioner has filed no objections to the PFRD,¹ and, upon review of the record, I concur with the Magistrate Judge's findings and recommendations.

Wherefore, IT IS HEREBY ORDERED that the Magistrate Judge's Proposed Findings and Recommended Disposition (*doc. 54*) is ADOPTED. Plaintiff's Motion

¹ On June 21, 2013, the PFRD was mailed to Petitioner at the address indicated on his initial filing. Despite the lack of any change of address filing by Petitioner, the Court had reason to believe that Petitioner had since been moved to a new facility. In an abundance of caution, the Court mailed a second copy of the PFRD to the "new" address on July 10, 2013. The Court delayed adopting the PFRD until a full period of time for filing objections passed from the second mailing. Notwithstanding this additional time, Petitioner has filed no objections.

under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (*doc. 1*) is DENIED and this case is DISMISSED WITH PREJUDICE.

A handwritten signature in black ink, appearing to read "Robert Brack", written in a cursive style.

ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE